87-1604

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAUL KANE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

The Bourjaily holding, that the Confrontation Clause is satisified by a preliminary hearing to determine admissibility of a co-conspirator declarant's statement, is thwarted when:

(1) The government asserts that the statements are not offered to show their truth so that;

(2) no preliminary hearing under Federal Rule of Evidence 801(d)(2)(E) is required or held, but thereafter

(3) the statements are in fact used against defendant.

II

Is it necessary that a court define the words "undertaken in concert" and "criminal enterprise" to a jury which is to consider a count charging a defendant with the violation of Title 21 Sec. 848?

III

Does the express limitation in the Continuing Criminal Enterprise act, to persons who are supervisors, managers, or organizers over five or more persons permit the conviction under that section of persons not within the described categories, i.e. a financier?

To avoid duplication of presentation, Petitioner respectfully requests the Court to consider, where applicable to him, those matters presented in Petition filed by his co-defendant, sub nominee Gary Levitz v. United States, parties to the proceedings in the Courts below.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

Plaintiff-Appellee:

United States of America

Defendants — Appellants:

Saul Kane, (this petitioner)
Gary Levitz
Barry Druker (Trial Court only)

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SAUL KANE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Saul Kane respectfully prays that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit to review the judgment and order entered in this proceeding on January 25, 1987.

The judgment and order of the Court of Appeals for the Third Circuit is not reported. (A-1)

No opinion was rendered by the trial court in entering its judgment of conviction reviewed by the Court of Appeals.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment and order of the Court of Appeals was entered on January 25, 1987.

Jurisdiction to review the judgment by petition for writ of certiorari is conferred on this Court by the provisions of Title 28, United States Code, Section 1254(1).

This case presents important questions of Federal laws which have not been, but should be settled by this Court and are in conflict with statements pronounced by this Court.

The questions also disclose conflict between circuits.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, United States Code, Section 2, is as follows:

Section 2, Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by them or another would be an offense against the United States, is punishable as a principal.

Title 21, Section 848 states in part:

(b) "Continuing criminal enterprise" defined. For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this title or title III the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Rule 801, Section (c) Federal Rules of Evidence:

"Hearsay" is a statement other than one made by the declarant at the trial or hearing offered in evidence to prove the truth of the matter asserted.

Rule 801, Section (d)(2)(E) Federal Rules of Evidence:

A statement made by a co-conspirator of a party during the course of and in the furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner was charged by indictment in the United States District Court, District of New Jersey with conspiracy to violate Title 21, U.S.C. Section 846; Engaging

in a continuing criminal enterprise in violation of Title 21, U.S.C. Section 848 and Title 18, U.S.C. Section 2; and 6 counts of possessing with intent to distribute Phenyl-2-Propanone in violation of Title 21, U.S.C. Section 841 (a)(1) and Title 18, U.S.C. Section 2.

Prior to the beginning of the trial counsel for Petitioner objected to the proposed introduction of tapes of phone calls.

Those calls were made or received by Mark Levitz to or from his brother Gary Levitz. They were recorded by Mark Levitz with equipment supplied to him by Federal agents.

That scenario followed the decision of Mark Levitz to assist the agents in securing evidence against his brother, this Petitioner and Barry Druker who were later charged with being involved in varying degrees in the importation of P2P, a controlled substance.

That enterprise had been started by Mark Levitz who was the only one who had the contacts in Europe and Central America where the P2P originated.

The objection to the use of the tapes on the basis of hearsay was denied when the government advised the Court that the tapes were not being introduced to show the truth of the statements made in the phone calls, but only to show the effect on Gary Levitz. Petitioner was not a party to any of the conversations. He was however referred to in those phone calls.

Those references to the petitioner in the calls formed the primary basis for the prosecutor's closing arguments in seeking the conviction of Petitioner.

The only testimony, relative to this Petitioner, other than the phone call references, came from Mark Levitz.

He testified about four occasions when he said he was given money for the importation of P2P by Petitioner.

Mark Levitz testified that Petitioner was the "financier" of the group.

Conviction followed.

Petitioner was sentenced to a total of 95 years in custody.

On appeal the Circuit Court of Appeals for the Third Circuit stated, inter alia, that:

1. The tapes were properly admitted.

2. The trial judge properly read the statutory definitions of the Continuing Criminal enterprise statute.

3. There was evidence that Petitioner was the manager, supervisor, or organizer of five or more persons engaged in a Continuing Criminal Enterprise.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

QUESTION I
The Admissibility of the Tapes

In *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) it was held that the inquiry into unavailability was not required when a hearsay statement is the out-of-court declaration of a co-conspirator.

In *Bourjaily v. United States,* 483 U.S. ____, 107 S.Ct. 2775 97 L.Ed. 2d 144 (1987) this Court held that an inquiry into whether independent indicia of reliability existed before admission of the declarations was not mandated by the Constitution.

Each Court examined the needs of a defendant to be assured of protection of his rights under the confrontation clause.

The Court examined and analyzed the interplay between Federal Rules of Evidence 104(a) and 801(d)(2)(E).

It was held that the requirements for admission of a co-conspirator's out-of-court declarations are identical to the requirements of the Confrontation Clause.

In Bourjaily, supra, this Court stated:

"Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "in the course and in furtherance of the conspiracy." Federal Rule of Evidence 104(a) provides: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." Petitioner and respondent agree that the existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court."

As pointed out in Inadi, supra in footnote 11:

". . . many co-conspirator statements are not introduced to prove the truth of the matter asserted and thus do not come within the traditional definition of hearsay, being without the special exemption of Federal Rule of Evidence 801(d)(2)(E). Thus, some of the out-of-court statements in this case presumably could be admitted without implicating the Confrontation Clause."

The application of the foregoing principles of law reveals the following.

Mark Levitz was given tape recording equipment by the Federal agents to tape conversations with the targets of the investigation.

Many calls were recorded between Mark Levitz and his brother Gary Levitz. Petitioner was not a party to any call. His name was mentioned many times however.

Petitioner's counsel prior to trial filed and argued a motion to prevent the use of those tapes.

When the government responded that the tapes were not being used for the truth of the contents, but to

show their effect on Gary, the Court was not required to and did not hold a pre-trial evidentiary hearing under Federal Rule of Evidence 801(d)(2)(E).

At the trial those tapes became the heart of the evidence and argument of the government against petitioner. They were used in arguing the truth of their contents.

Thus, petitioner was denied his constitutional right under the Confrontation Clause.

QUESTION II

The Understanding of Continuing Criminal Enterprise

It is respectfully submitted that Congressional statutory language falls into two categories in relation to this point.

First, language that needs no explanation to a jury because of its everday meaning.

Second, statutory language that is foreign to a jury and thus needs explanation.

The words manager, supervisor, organizer were discussed in *United States v. Wilkerson,* 754 F.2d 1427 (2d Cir. 1986). That Court held that the words in question survived the attack of vagueness. They were to be understood in their usual ordinary meaning.

In *Jeffers against United States,* 432 U.S. 137 (1937) this Court discussed the meaning of the phrase "in concert" contained in Title 21 U.S.C. 848. The Court at 148-150 found the language had to mean an agreement.

In footnote 14, at pp. 149-150, it is stated:

> "When the phrase "in concert" has been used in other statutes, it has generally connoted cooperative action and agreement." (Statutes cited) This suggests that Congress intended the same words to have the same meaning in 848. Even *Iannelli* did not require the word "conspiracy" to be spelled out in the statutory definition, as long as the concept of

> agreement was included therein. 420 U.S., at 785 n17, 95 S.Ct. 1284. Since the word "concert" commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandoned."

But, Jeffers, supra did not discuss undertaken in concert.

It is Petitioners contention that undertaken in concert can be interpreted as requiring a group of six or more from the beginning of the plan in order to qualify for possible inclusion of the manager, supervisor or organizer of five or more as a possible target of a continuing criminal enterprise charge.

The phrase undertaken in concert could also mean that the requisite number could be reached through a series of separate conspiracies with one dominant person as the manager, supervisor, or organizer.

But, the court should certainly be required to explain that analysis which is correct to the jury. Surely the words have no everyday meaning which would obviate the necessity for clarification.

Similarly, it is urged that the statutory language "criminal enterprise" is not self-defining.

In *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed. 2d 246 (1981) this Court said that an enterprise is

> "a group of persons associated together for a common purpose of engaging in a course of conduct" and "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."

In this case the Third Circuit Court of Appeals held that it was sufficient that the trial judge read the statutory definitions and elements of the charge to the jury.

It is contended that for a jury to properly interpret the evidence before reaching a verdict it would be necessary that it understand the act under which the charge was levied.

Merely reading the statutory definition and elements of the continuing criminal enterprise statute did not permit the jury in this case to understand the facts in relation to an *understanding* of the law.

United States v. Ianniello, 808 F.2d 184 (2nd Cir. 1986) discloses the existing conflict and confusion amongst the Circuits in considering continuous criminal activity as opposed to discrete criminal activity. Ianniello, supra points out the inter Circuit conflict.

The difference in interpretation of the meaining of the law makes it clear that the conflict needs resolving. However, a trial judge must still instruct the jury as to his interpretation of the law in an understandable manner.

The complex legal language of Congress must reach the language of the lay person. This was not done in this case.

QUESTION III
The Conviction of a Financier

The avalanche of cases charging continuing criminal enterprise violations suggests that it may be the new "darling of the prosecutors."

It appears that the limitations contained in Garrett v. United States 471 U.S. 773, 105 S. CT. 2407 (1985) are not being sufficiently adhered to by the various offices of the United States Attorneys.

> "A common sense reading of this definition reveals a carefully crafted prohibition aimed at a special problem. This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." Garrett, supra.

The carefully crafted definition does not include a "financier" as one who is the target of this particular section of the Drug Abuse Law although he can be punished, if appropriate, under other provisions of the law.

The doctrine of Inclusio Unius Est Exclusio Alterius is applicable in this situation.

Black's Law Dictionary revised 4th edition:

> "The inclusion of one is the exclusion of another. The certain definition of one person is an absolute exclusion of all others. 11 Coke, 586; *Burgin v. Forbes,* 293 KY. 456, 169 S.W. 2b. 321,325."

The fact that Congress meant to limit the application of the law to carefully designated types of persons was later shown.

On October 27, 1986 Congress again showed its specific intention to limit the scope of Title 21 Section 848.

Congress amended the law and added to the list of those persons who were to be included in the gamit of the continuing criminal enterprise violations.

> " . . . such person is the *principal administrator,* organizer, or *leader* of the enterprise or is one of several such *principal administrators,* organizers, or *leaders;* and . . ." (Emphasis supplied)

Financier was not included.

It is urged that under the philosophy of Garrett, supra and its recognition of the carefully crafted language of the Act, the Court of Appeals erred in permitting a financier to be convicted of violation of Section 848.

The effective holding in this case by the Third Circuit Court of Appeals is in direct conflict with the holding of the Second Circuit Court of Appeals in United

States v. Amen 831 F2D. 373 (2nd Cir. 1987). In that case the Court followed the holding of Garrett, supra, and said:

> "When Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense."

The Second Circuit cited Gebardi v. United States, 287 U.S. 112, 123, 53 S. CT. 35, 38, 77 L. Ed. 206 (1932) and United States v. Farrar, 281 U.S. 624, 634, 50 S. CT 425, 427, 74L. Ed. 1078 (1930) as further authority for that position.

In U.S. v. Benevento 836 F.2D.60 (2nd Cir. 1987) the same Circuit reafirmed its position.[1]

It reversed a conviction of Ernest A. Benevento, an uncle of the leader of the enterprise, Ernest J. Benevento.

The uncle supplied a residence for a drug manufacturing laboratory, kept financial records, contributed substantial capital to the enterprise, attempted to smuggle currency. He was, in fact, a financier. His conviction was reversed.

That is precisely the point raised by Petitioner in the Court below.

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1. In this case, Petitioner was charged with both violating Title 21, U.S.C. Section 848 and Title 18, U.S.C. Section 2 — Aiding and abetting. Both Benevento, supra and Amen, supra held that aiding and abetting is not a crime cognizable under the Continuing Criminal Enterprise Act. If this analysis is correct, Petitioner was sentenced for a non-existent crime.

Since this was not raised below it is not raised here.

It is Petitioners intention to raise this point under Title 28, U.S.C. Section 2255 application directly or to seek remand under Title 28, U.S.C. Section 2106 for that purpose.

CONCLUSION

It is respectfully urged that the conflict between Circuits on important questions of law and the conflict between holdings in the Court below and opinions of this Court warrant issuance of the Writ of Certiorari so that the entire record may be reviewed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-5338

UNITED STATES OF AMERICA

v.

SAUL KANE,

Appellant

(Criminal Action No. 86-00286-01)
District Judge: Honorable Clarkson S. Fisher

Submitted Under Third Circuit Rule 12(6)
January 4, 1988

BEFORE: SEITZ, HUTCHINSON and ROSENN,
Circuit Judges.

JUDGMENT ORDER

The court has considered the following numbered contentions of appellant, Saul Kane, and has reached the following conclusions with respect thereto:

1. The trial judge failed to charge the jury properly in that he did not define all of the elements of a continuing criminal enterprise. The trial judge omitted an explanation of "continuing criminal enterprise", "undertaken . . . in concert". He therefore did not provide the jury with an explanation of the law sufficient for it to analyze the evidence submitted to it in relation to the law as pronounced by the court.

The appellant did not raise this issue by objecting to the jury instructions at the charge conference or following the charge. Nevertheless, we will review the issue because the failure to charge with respect to an essential element of a crime is cognizable under the plain error doctrine. The record shows that the court read the statutory definition of a continuing criminal enterprise to the jury and listed the necessary elements. We cannot say that plain error was committed under these circumstances.

2. There is no evidence that would support a finding that Saul Kane supervised, organized or managed five or more people who were a part of a continuing criminal enterprise.

We are satisfied that the evidence supported the jury's conclusion that appellant supervised, organized or managed five or more people as part of a continuing criminal enterprise. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

3. Consent tape recorded telephone calls between an informant (working for the government) and a co-conspirator may not be considered against a defendant who is not a party to those conversations when those conversations did not take place during the course of and in furtherance of the conspiracy.

We review for abuse of discretion and cannot conclude that the refusal of the district court to suppress on this record amounted to an abuse of discretion or, in any event, to reversible error.

4. Pervasive prosecutorial misconduct requires reversal of this conviction.

We have reviewed the evidence and under controlling legal standards conclude that the district court did not abuse its discretion in denying the

various motions for a mistrial, although some of the prosecution's conduct was less than exemplary.

5. The record disclosed that prosecutorial vindictiveness is likely where a second superseding indictment adds a continuing criminal enterprise charge for the first time where no change in circumstances exists other than appellant's application for pre-trial release.

The record does not support this contention.

6. The sentencing was invalid.

We have reviewed appellant's specific contentions and find them meritless on this record.

7. Appellant Saul Kane hereby adopts, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, each of the arguments made by his co-appellant insofar as those issues are applicable to him.

Assuming that appellant properly invoked Fed.R.App.P. 28(i), any arguments made in the co-appellant's brief (Levitz) that apply to this appellant are rejected essentially for the reasons given in the judgment order affirming the judgment of sentence of co-appellant (87-5310).

It is possible that the fine imposed under the merged sentence may have exceeded the maximum permissible under 21 U.S.C. §848, although the government justifies the amount of the fine by reference to 18 U.S.C. §3623, subsequently repealed. We think the matter is more appropriately addressed by the district court in a Fed.R.Crim.P. 35 motion.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed without prejudice to the filing of a Fed.R.Crim.P. 35 motion in the district court as to the amount of the fine imposed on the merged Counts 1 and 2 convictions.

By the Court,

_____

Circuit Judge

ATTEST:

_____

Sally Mrvos, Clerk

Dated January 25, 1988